

<b>LFC Requester:</b>	<b>Ruby Ann Esquibel</b>
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**AGENCY BILL ANALYSIS  
2013 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

**LFC@NMLEGIS.GOV**

*And*

**DFA@STATE.NM.US**

*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**     **Amendment**      
**Correction**     **Substitute**   

**Date** January 30, 2013  
**Bill No:** HB 122--305

**Sponsor:** Rep. Nora Espinoza  
**Short**    Woman's Right to Know  
**Title:**    \_\_\_\_\_

**Reviewing**    Attorney General's Office  
**Person Writing**    Sally Malavé  
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**SECTION II: FISCAL IMPACT \*\*\*\*FOR LFC OFFICIAL PURPOSES\*\*\*\***  
**AGO STAFF SHOULD LEAVE SHAGED AREAS BLANK**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

Duplicates/Relates to Appropriation in the General Appropriation Act

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY13	FY14	FY15		

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

**SECTION III: NARRATIVE**

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion Letter. This is a staff analysis in response to the agency’s committee’s or legislator’s request.

**BILL SUMMARY**

Summary Synopsis: House Bill 122 aims to regulate the provision of abortions in the state. It appears to be modeled after similar legislation enacted in various other states. See e.g., N.C. Gen. Stat. § 90-21.82 (2011); S.C. Code Ann. § 44-41-330 (2011); Minn. Stat. § 145.4242 (2012). Under House Bill 122, providers of abortions would be required by telephone or in person to provide a patient seeking an abortion with certain information at least 24 hours prior to an abortion procedure. Prior to a patient giving informed consent and prior to the administration of any medication in preparation for the procedure, an abortion provider is required to perform an obstetric ultrasound, provide a simultaneous verbal explanation of the ultrasound depiction, display the ultrasound images so that the woman may see the images, provide a medical explanation of the ultrasound images, and obtain a written certification from the patient that the ultrasound requirements have been met, that certain information has been furnished to her and that she has been informed of her opportunity to review the information. The provider is also required to use a hand-held Doppler fetal monitor to allow the patient to hear the fetal heart beat, if audible, and offer “to attempt to make the heart beat audible” at a future time. When a medical emergency compels the performance of an abortion, the physician must inform the patient, prior to the abortion if possible, of the medical indications supporting the physician’s judgment that an abortion is necessary to avert or death or that a 24-hour delay will create serious risk of substantial and irreversible risk of a major bodily function, not including psychological or emotional conditions.

If enacted, House Bill 122 requires the Department of Health within 90 days to develop and maintain a stable internet web site to provide the information proscribed by the act and ensure that the materials are printable. It proscribes the information that must be provided in the printed materials, including geographically indexed materials designed to inform the user of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and beyond, materials designed to inform the user of the probable anatomical and physiological characteristics of the fetus at two-week gestational increments from onset to full term, including information of the possibility of survival and realistic pictures or drawings representing the unborn child. If an abortion provider has a web site, HB 122 requires that the provider’s internet web site home page to have at least two direct links to the informed consent materials on DOH web site.

If enacted, House Bill 122 imposes certain reporting requirements on abortion providers and DOH. It requires DOH within 90 days of enactment to prepare a form for physicians that includes the Woman’s Right to Know Act and requires a physician to report certain information. It requires DOH within 120 days of enactment to ensure that blank copies of the

required reporting forms are provided to all physicians licensed in the state, to each physician who subsequently becomes licensed, and by December 1 of each year thereafter to all physicians licensed to practice in New Mexico. By February 28 of each year the enactment of HB 122, each physician or physician's agent who provided information to one or more women in accordance with the act during the previous calendar year is required to report to DOH certain information required by the act on the reporting form provided by DOH. Reports not submitted timely subject to \$500 late fee for each additional 30-day period or portion of 30-day period the reports are overdue. HB 122 authorizes DOH to petition a court of competent jurisdiction to direct a physician who has failed to submit a completed report more than one year following the due date to submit a completed report within a period stated by the court order or be subject to sanctions for civil contempt. By June 30 of each year, HB 122 requires DOH to issue a public report containing certain statistical information for the previous calendar, compiled from the reports submitted to DOH by abortion providers.

House Bill 122 imposes criminal penalties on abortion providers for violations of the act. Any person who knowingly or recklessly performs or attempts to perform an abortion in violation of the act shall be guilty of a felony. A physician who knowingly or recklessly submits a false report shall be guilty of a misdemeanor. It also creates rights of action for any person upon whom an abortion has been performed or has been attempted against an abortion provider who performed or attempted to perform the abortion in knowing or reckless violation of the act, and for the father and grandparents of the aborted fetus against the abortion provider who performed the abortion in knowing or reckless violation of the act. A prevailing plaintiff may recover actual damages, punitive damages and reasonable attorney fees. A prevailing defendant may recover attorney fees only upon a finding that the plaintiff's suit was frivolous and brought in bad faith. HB 122 provides for the protection of privacy of any woman upon whom an abortion has been performed or attempted in every civil and criminal court proceeding brought under the act.

## **FISCAL IMPLICATIONS WITH ENACTING THIS BILL**

None to this office.

## **SIGNIFICANT LEGAL ISSUES**

Before viability, "a state may not prohibit any woman from making the decision to terminate her pregnancy." Gonzales v. Carhart, 550 U.S. 124, 146 (2007), quoting Planned Parenthood of Eastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992). It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability". 550 U.S. at 146. On the other hand, "regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* However, because the Supreme Court's holding in Casey did not foreclose a facial challenge to abortion statute in other states that are similar to those found constitutional in Casey, HB 122 may be challenged on the grounds that it places an undue burden on woman's right to obtain an abortion without interference. See Karlin v. Foust, 188 F.3d 446, 485 (1999)

## **PERFORMANCE IMPLICATIONS WITH ENACTING THIS BILL**

None to this office

## **ADMINISTRATIVE IMPLICATIONS WITH ENACTING THIS BILL**

None to this office

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP WITH BILLS INTRODUCED THIS SESSION**

None

## **TECHNICAL ISSUES OR DRAFTING ERROR**

N/A

## **OTHER SUBSTANTIVE LEGAL ISSUES**

The bill refers at various places to abortion provider, physician, certified technician, or another agent of the physician, but it is not clear whether the bill intends to limit the authority to perform an abortion to a licensed physician or allows other licensed professionals to perform abortions. If HB 122's intent is limit the performances of abortion to licensed physicians, it may be challenged on the grounds that it imposes an undue burden on a woman's right to obtain an abortion where there is a physician shortage in many parts of the state.

## **ALTERNATIVES TO ENACTING THIS BILL**

N/A

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo. As a matter of practice and law, licensed abortion providers are required to obtain the prior informed consent of any patient upon whom they intend to perform any medical procedure, including an abortion procedure. Informed consent generally requires that the patient be told the general nature of her condition, the proposed treatment or procedure, the expected outcome, the material risks, and the reasonable alternatives to the treatment or procedure.

## **AMENDMENTS NEEDED TO IMPROVE THIS BILL**

N/A